

**Below is a Memorandum Decision of  
the Court.**



*Mary Jo Heston*  
**Mary Jo Heston**

**U.S. Bankruptcy Judge**

(Dated as of Entered on Docket date above)

**UNITED STATES BANKRUPTCY COURT  
WESTERN DISTRICT OF WASHINGTON AT TACOMA**

In re:

BERNICE GORKIN,

Debtor.

1ST RATE CONSTRUCTION and DRAIN  
WIZARD INC. and FREDERICK ARDRY,

Plaintiffs

v.

BERNICE GORKIN,

Defendant

Case No. 23-41888-MJH

Adversary No. 24-04011-MJH

**MEMORANDUM DECISION ON  
DEFENDANT'S MOTION FOR  
SUMMARY JUDGMENT**

This matter came before the Court on April 11, 2024, on a motion for summary judgment filed on March 3, 2024, by Defendant Bernice Gorkin ("Ms. Gorkin") in the above-referenced proceeding pursuant to Federal Rule of Bankruptcy Procedure 7056<sup>1</sup> ("Motion"). Plaintiffs 1st Rate Construction and Drain Wizard Inc. and Frederick Ardry, president of 1st Rate Construction and Drain Wizard Inc. (collectively "1st Rate"), oppose

<sup>1</sup> Unless otherwise indicated, all chapter, section, and rule references are to the Federal Bankruptcy Code, 11 U.S.C. § 101–1532, and to the Federal Rules of Bankruptcy Procedure, 1001–9037.

the Motion. The Court, having considered the arguments of counsel and the record for the Motion as set forth below, states its opinion as follows:

### **I. PROCEDURAL HISTORY**

On January 16, 2024, 1st Rate filed this adversary proceeding. Pls.' Compl., ECF No. 1. The complaint alleges nondischargeability pursuant to 11 U.S.C. § 523(a)(2), (a)(4), and (a)(6), related to unpaid damages arising from a judgment adverse to Gorkin, entered by Pierce County Superior Court ("Superior Court"). Pls.' Compl., ¶¶ 4.1-4.20.<sup>2</sup> On February 5, 2024, Ms. Gorkin filed a pro se response to adversary summons, which appears to be an unverified statement of facts from Ms. Gorkin's perspective. Def.'s Stmt., ECF No. 4. On February 8, 2024, Ms. Gorkin filed a second pro se response to the adversary summons, identical to the first. Def.'s Second Stmt., ECF No. 6. On February 26, 2024, Ms. Gorkin, through her counsel, filed an amended answer to the Complaint. Def.'s Am. Answer, ECF No. 11.

On March 4, 2024, Ms. Gorkin filed this Motion. Def.'s Mot. Summ. J., ECF No. 12. On March 5, 2024, Ms. Gorkin filed a declaration in support of the Motion. Def.'s Decl., ECF No. 13. The declaration was supported by the following: (1) copies of the original contracts between the parties, (2) a declaration of Frederick Ardy from the Superior Court case, (3) a copy of the Superior Court's judgment against Ms. Gorkin ("Judgment"), (4) 1st Rate's plead counterclaims in the Superior Court case, and (5) a copy of the Superior Court case's docket.

On April 3, 2024, 1st Rate filed a response to the Motion. Pls.' Resp. Mot. Summ. J., ECF No. 17. 1st Rate included the following in support of its response: (1) a declaration of Mark Lawless of Construction Systems Management Inc. containing his credentials and report concerning the Superior Court Case; (2) the complaint filed by Ms. Gorkin to the

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<sup>2</sup> Although the complaint alleges § 523(a)(4) as a basis for nondischargeability in the caption, there is no cause of action pleaded in the complaint, nor are there any facts in support of nondischargeability under § 523(a)(4). Accordingly, the Court infers that this is a typographical error by the Plaintiffs.

1 Attorney General of Washington; (3) portions of statements made by Ms. Gorkin at a  
2 deposition on November 17, 2022; (4) Ms. Gorkin's answer to prior interrogatories; (5)  
3 photographs of septic; (6) property records of the property; (7) statements made by Ms.  
4 Gorkin in a prior declaration; and (8) a prior motion and order to which Ms. Gorkin was a  
5 party in a separate case. Pls.' Resp. Mot. Summ. J., ECF No. 17-1-17-9. On April 4, 2024,  
6 Ms. Gorkin filed her reply in support of the summary judgment. Def.'s Reply, ECF No. 18.

7 On April 11, 2024, the Court held a hearing on the Motion. At the hearing, the Court  
8 heard oral arguments from counsel and informed 1st Rate's counsel that the declaration  
9 of counsel supporting 1st Rate's response to summary judgment was unsigned. The Court  
10 ordered 1st Rate's counsel to file an amended response with a signed declaration and took  
11 the Motion under advisement. On April 11, 2024, 1st Rate's counsel filed the amended  
12 response. Pls.' Am. Resp. Mot. Summ J., ECF No. 23. Accordingly, the Motion is now  
13 properly before the Court.

## 14 **II. FACTUAL BACKGROUND**

15 The facts set forth in this section are undisputed by the parties.

### 16 **A. THE REFINANCE AND RESIDENTIAL CONSTRUCTION CONTRACTS.**

17 In early April 2021, Ms. Gorkin refinanced her residence at 1816 6<sup>th</sup> Street S.W.,  
18 Puyallup, WA 98371 ("Residence"). Def.'s Decl., 1:18-1:19. She captured approximately  
19 \$40,000 in equity from the refinance to improve the Residence. Def.'s Decl., 1:18-1:19; Pls.'  
20 Am. Resp. Mot. Summ J. 7:12.

21 On or about April 22, 2021, Ms. Gorkin entered into two residential construction  
22 contracts with 1st Rate concerning Ms. Gorkin's Residence ("Contracts"). Def.'s Decl., Ex.  
23 A, B; Pls.' Am. Resp. Mot. Summ. J., 3:9-3:14. The Contracts contemplated constructing  
24 and rehabilitating Ms. Gorkin's 1.5 bathrooms and repairing improper drainage and  
25 toilets. Pls.' Am. Resp. Mot. Summ. J., 3:9-3:14; Def.'s Decl., 1:23-1:25. Before entering  
26 into the Contracts, 1st Rate provided an estimate for Contract A1 for \$12,930.00 and  
27 Contract A2 for \$5,795.00, collectively \$18,725.00. Def.'s Decl., 2:1-2:2, Ex. A; Pls.' Am.

1 Resp. Mot. Summ. J., 3:15-3:16; Pls.' Resp. Mot. Summ. J. Ex. 1. Ms. Gorkin paid  
2 \$11,691.00 as an initial down payment. Pls.' Am. Resp. Mot. Summ. J., 3:16-3:17; Def.'s  
3 Decl., 2:12-2:14, Ex. B.

4 After work began on the Residence, a disagreement arose between the parties  
5 concerning whether Ms. Gorkin verbally approved additional work beyond the scope of  
6 the bathrooms referenced in the Contracts. Def.'s Decl., 2:9-2:14, Ex. B; Pls.' Am. Resp.  
7 Mot. Summ. J., 3:15-4:4. The parties had further disagreements concerning the quality  
8 and extent of work completed. Ms. Gorkin ultimately terminated 1st Rate by August 2021.  
9 Pls.' Am. Resp. Mot. Summ. J., 3:17-3:18; Def.'s Decl., 2:9-2:11. At the time of termination,  
10 1<sup>st</sup> Rate asserted that Ms. Gorkin owed an amended balance of \$29,040.68 after  
11 completing the additional work. Pls.' Am. Resp. Mot. Summ. J., 3:17-3:18; Def.'s Decl., 2:9-  
12 2:11.

### 13 **B. THE SUPERIOR COURT CASE AND JUDGMENT**

14 On November 11, 2021, Ms. Gorkin filed the Superior Court case against 1st Rate.  
15 Def.'s Decl., Ex. E. On September 15, 2021, after nearly two years of contested litigation,  
16 the Superior Court entered a judgment in favor of 1st Rate for approximately \$66,140.20<sup>3</sup>  
17 *plus* post-judgment interest accruing at 12% per annum. Def.'s Decl., Ex. C; Pls.' Compl.,  
18 3:6-3:7. The Superior Court judgment based its judgment on 1st Rate's counterclaims for  
19 breach of contract, unjust enrichment, and quantum meruit. Def.'s Decl., Ex. D.

### 20 **C. THE BANKRUPTCY FILING**

21 On October 30, 2023, shortly after the Superior Court entered its judgment, Ms.  
22 Gorkin filed for chapter 7 relief. Bankr. Case No. 23-41888-MJH, ECF No. 1. Ms. Gorkin  
23 scheduled the Residence with an alleged value of \$493,800.00, subject to a mortgage held  
24 by Chase Mortgage in the amount of \$205,048.00. Bankr. Case No. 23-41888-MJH, ECF

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25  
26 <sup>3</sup> The Court notes that there are crossed-out amounts on the judgments and corrections to the judgment  
27 amount. The Court notes, however, that the corrected amounts on the judgment match 1st Rate's alleged  
amount.

No. 1 at 15. Ms. Gorkin asserts that the value of the home has remained the same since the time of filing but that the mortgage is now \$197,076.12, presumably due to monthly payments by Ms. Gorkin. Def.'s Decl., 1:21-1:22. On November 29, 2023, the chapter 7 trustee filed a report of no distribution. On January 16, 2024, 1st Rate timely filed this adversary proceeding. On March 14, 2024, the Court entered an Order of Discharge, Bankr. Case No. 23-41888-MJH, ECF No. 10, and closed the main bankruptcy case on March 18, 2024.

### III. DISCUSSION

#### A. JURISDICTION

This Court has jurisdiction over the Motion and adversary proceeding under 28 U.S.C. § 1334(b), and the Motion and adversary proceeding is a core matter pursuant to 28 U.S.C. § 157(b)(2)(I). Bankruptcy courts have exclusive jurisdiction over nondischargeability actions brought pursuant to § 523(a)(2) and (a)(6). *See In re Goscicki*, 207 B.R. 893, 897–98 (9th Cir. BAP 1997); *In re Aldrich*, 34 B.R. 776, 779–80 (9th Cir. BAP 1983).

#### B. SUMMARY JUDGMENT STANDARD

The party seeking summary judgment bears the burden of demonstrating that there are no genuine issues of material fact and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a), made applicable by Fed. R. Bankr. P. 7056; *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986). All inferences drawn from the evidence presented must be drawn in favor of the party opposing summary judgment, and all evidence must be viewed in the light most favorable to that party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Summary judgment should be granted if, after taking all reasonable inferences in the nonmoving party's favor, the court finds that no reasonable jury could find for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). The responding party may not rest upon mere allegations or denials of their pleadings but must set forth specific facts showing that there is a genuine issue for trial. *Id.* at 256.

1 As the moving party, Ms. Gorkin bears the burden of establishing that there are no  
2 genuine issues of material fact and that she is entitled to judgment as a matter of law on  
3 the nondischargeability claims. All inferences from the evidence presented are drawn in  
4 the light most favorable to the 1st Rate. If Ms. Gorkin establishes that one element of 1st  
5 Rate's claims for relief are not met, she is entitled to judgment as a matter of law. *See*  
6 *Celotex*, 477 U.S. at 322–23 (the nonmoving party who bears the burden of proof at trial  
7 must make a “sufficient showing” that he can establish each element of his case at trial).

### 8 **C. NONDISCHARGEABLE DEBTS UNDER § 523**

9 One of the fundamental policies of the Bankruptcy Code is the fresh start afforded  
10 debtors through the discharge of their debts. *In re Devers*, 759 F.2d 751, 754–55 (9th  
11 Cir.1985). To effectuate the fresh start policy, exceptions to discharge should be strictly  
12 construed against an objecting creditor and in favor of the debtor. *In re Klapp*, 706 F.2d  
13 998, 999 (9th Cir.1983). Furthermore, a party objecting to the dischargeability of a specific  
14 debt bears the burden of proof for each element by a preponderance of the evidence.  
15 *Grogan v. Garner*, 498 U.S. 279, 291 (1991).

#### 16 **1. Nondischargeable Debts Under § 523(a)(2).**

17 Under § 523(a)(2), there are two circumstances in which a debt is nondischargeable.  
18 First, under § 523(a)(2)(A), a debt for money or property is not dischargeable if it was  
19 obtained by “false pretenses, a false representation, or actual fraud, other than a  
20 statement respecting the debtor's . . . financial condition.” The creditor must prove:

- 21 (1) that false representations were made.
  - 22 (2) that at the time made, the representations were known to be false.
  - 23 (3) that the representations were made with the intention and purpose of  
deceiving the creditor.
  - 24 (4) that the creditor relied on such representations; [and]
  - 25 (5) that the creditor sustained the alleged loss and damage as the proximate  
result of such misrepresentations.
- 26  
27

1 *See In re Sabban*, 600 F.3d 1219, 1222 (9th Cir. 2010) (quoting *Am. Express Travel Related*  
2 *Servs. Co. v. Hashemi (In re Hashemi)*, 104 F.3d 1122, 1125 (9th Cir. 1996)).

3 Second, § 523(a)(2)(B) prohibits a discharge where a money or property debt was  
4 explicitly obtained by using a false written statement of the debtor's or an insider's  
5 financial condition. The creditor must prove: (1) the debtor made a written representation  
6 of fact concerning the debtor's or an insider's financial condition; (2) that was material; (3)  
7 that the debtor knew at the time to be false; (4) that the debtor made with intent to deceive  
8 the creditor; (5) upon which the creditor relied; (6) that the creditor's reliance was  
9 reasonable; and (7) that damage proximately resulted from the representation. *In re*  
10 *Candland*, 90 F.3d 1466, 1469 (9th Cir.1996).

11 The term "financial condition," as used in § 523(a)(2)(B), means one's overall financial  
12 status. *Lamar, Archer & Cofrin, LLP v. Appling*, 584 U.S. 709, 716 (2018). For example,  
13 even a statement concerning a single asset can be a statement respecting the debtor's  
14 financial condition. *Id.* If such a statement is not in writing, the associated debt may be  
15 discharged, even if the statement was false. *Id.* Additionally, § 523(a)(2)(B) requires a  
16 creditor to show reasonable reliance, a more rigorous, objective standard than "justifiable  
17 reliance" required under § 523(a)(2)(A), which takes into account the subjective and  
18 specific aspects of a party's circumstances. *Field v. Mans*, 516 U.S. 59, 61 (1995).

19 It is well established that the subsections of § 523(a)(2)(A) and (B) are mutually  
20 exclusive. *See In re Barrack*, 217 B.R. 598, 605 (9th Cir. BAP 1998); H.R. REP. 95-595,  
21 549, 1978 U.S.C.C.A.N. 5963, 6453 ("Subparagraph (A) is mutually exclusive from  
22 subparagraph (B)."). Section 523(a)(2)(B) expressly deals with fraudulent  
23 misrepresentations respecting a debtor's financial condition. It adds the requirement that  
24 such misrepresentations be in writing. *Barrack*, 217 B.R. at 605. The provision also acts  
25 as an evidentiary protection for a debtor because it requires the creditor to prove fraud  
26 based on misrepresentations of financial condition using the more objective reasonable  
27 reliance standard. *See Field*, 516 U.S. at 72–77. Conversely, § 523(a)(2)(A) false pretenses,

1 a false representation, or actual fraud are common-law terms, and their elements are so  
2 defined, including a requisite reliance that is only justifiable. *Id.* Accordingly, any  
3 allegation of fraudulent misrepresentation concerning a debtor's financial condition may  
4 only be pled under § 523(a)(2)(B). *Barrack*, 217 B.R. at 605. (citing *In re County of Orange*,  
5 179 B.R. 185, 190 (Bankr. C.D.Cal.1995)).

## 6 **2. Nondischargeable Debts Under § 523(a)(6).**

7 Section 523(a)(6) excepts from discharge debts resulting from “willful and malicious  
8 injury by the debtor to another entity or to the property of another entity.” Section  
9 523(a)(6) generally applies to individual torts rather than breaches of contract. *Lockerby*  
10 *v. Sierra*, 535 F.3d 1038, 1040 (9th Cir. 2008). Negligent or reckless acts do not suffice to  
11 establish that a resulting injury is willful and malicious, and debts arising from recklessly  
12 or negligently inflicted injuries are not excepted from discharge under § 523(a)(6).  
13 *Kawaauhau v. Geiger*, 523 U.S. 57, 64 (1998).

14 It is settled in the Ninth Circuit that “a simple breach of contract is not the type of  
15 injury addressed by § 523(a)(6).” *In re Riso*, 978 F.2d 1151, 1154 (9th Cir. 1992).  
16 Furthermore, an intentional breach of contract is excepted from discharge under  
17 § 523(a)(6) only when it is accompanied by malicious and willful tortious conduct. *Id.*  
18 Thus, a “breach of contract must be accompanied by some form of ‘tortious conduct’ that  
19 gives rise to ‘willful and malicious injury.’” *In re Jercich*, 238 F.3d 1202, 1206 (9th Cir.  
20 2001).

21 In the Ninth Circuit, tortious conduct giving rise to § 523(a)(6) nondischargeability  
22 must arise out of a viable tort claim under state law. *Lockerby*, 535 F.3d at 1042. The  
23 *Lockerby* court explained its reasoning by stating that “[expanding] the scope of § 523(a)(6)  
24 to include contracts that are intentionally breached whenever it is substantially certain  
25 that injury will occur would severely circumscribe the ability of debtors to ‘start afresh.’”  
26 *Id.* In sum, in the Ninth Circuit, an intentional breach of contract absent a viable state  
27 law tort claim is insufficient to support a claim under § 523(a)(6).



1       **D. SUMMARY JUDGMENT CONCERNING ANY § 523(A)(2) CLAIM**

2       1st Rate's complaint does not specifically allege a nondischargeable claim under either  
3 § 523(a)(2)(A) or (a)(2)(B). Rather, it alleges nondischargeability under § 523(a) broadly.  
4 Further, 1st Rate's complaint alleges factual elements applicable under both  
5 § 523(a)(2)(A) and (a)(2)(B). At summary judgment, the court looks at the record in the  
6 light most favorable to the nonmovant. *Matsushita*, 475 U.S. at 587. Accordingly, the  
7 Court, for the purposes of this Motion, presumes that 1st Rate seeks a determination of  
8 nondischargeability under both § 523(a)(2)(A) and (B).

9       1st Rate asserts that Ms. Gorkin misrepresented her intent to pay for some of the  
10 work, including the latent defects not contemplated in the Contracts, which inevitably  
11 increased the remodeling costs, and further that Ms. Gorkin misrepresented her financial  
12 condition. Specifically, it alleges that she had the ability to pay for the contracted work at  
13 the time the parties entered the agreement. Pls.' Am. Resp. Mot. Summ. J., 7:11-7:13,  
14 8:16-8:18. Finally, 1st Rate alleges that notwithstanding Ms. Gorkin's financial condition,  
15 she misrepresented that she intended to pay for the work at the time of contracting. Pls.'  
16 Am. Resp. Mot. Summ. J., 7:24, 8:8, 9:1-9:4. Conversely, Ms. Gorkin argues as a threshold  
17 matter that 1st Rate is precluded from asserting that its Judgment is nondischargeable  
18 under either theory of § 523(a)(2) because of res judicata. Ms. Gorkin also argues that any  
19 claim based on reliance upon Ms. Gorkin's financial condition fails as a matter of law  
20 because 1st Rate did not rely on any writing concerning her financial condition. Finally,  
21 Ms. Gorkin asserts that 1st Rate's assertion does not raise a genuine issue of material fact  
22 because a rational fact finder could not find that Ms. Gorkin did not intend to pay for the  
23 full contracted amount in April 2021.

24       **1. Claim Preclusion is Inapplicable to the Nondischargeability**  
25       **Determination.**

26       Collateral estoppel principles apply in nondischargeability proceedings under the  
27 Code. *Garner*, 498 U.S. at 284. Res judicata, or claim preclusion, provides that a final

1 judgment on the merits of an action precludes the parties from relitigating all issues  
2 connected with the action that were or could have been raised in that action.” *Rein v.*  
3 *Providian Fin'l Corp.*, 270 F.3d 895, 898–99 (9th Cir.2001). Claim preclusion applies  
4 where “(1) the parties are identical or in privity; (2) the judgment in the prior action was  
5 rendered by a court of competent jurisdiction; (3) there was a final judgment on the merits;  
6 and (4) the same claim or cause of action was involved in both suits.” *Id.* (citing *Owens v.*  
7 *Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 713 (9th Cir.2001)). Nondischargeability  
8 claims, however, are entirely separate determinations with their own elements under the  
9 Code, which require more than establishing liability. Therefore, res judicata does not  
10 apply when the prior court does not determine whether a claim is dischargeable. *In re*  
11 *Berr*, 172 B.R. 299, 305 (9th Cir. BAP 1994). Conversely, collateral estoppel, or issue  
12 preclusion, does apply to individual fact determinations made by the prior court that were  
13 actually litigated. *Id.*

14 Here, the parties do not dispute that the Superior Court did not determine whether  
15 the debt was nondischargeable. Indeed, the Superior Court could not make such a  
16 determination. *Rein*, 270 F.3d at 904 (9th Cir. 2001) (holding that bankruptcy courts have  
17 exclusive jurisdiction over nondischargeability actions under § 523(a)(2), (4), (6), and (15)).  
18 Accordingly, the Court finds that the Superior Court Judgment does not preclude 1st Rate  
19 from pursuing a nondischargeability claim.

## 20 **2. Any § 523(a)(2)(B) Claim Fails as a Matter of Law.**

21 The complaint necessarily fails under § 523(a)(2)(B). First, Ms. Gorkin asserts that  
22 she did not provide 1st Rate with any writing pertaining to her financial condition, upon  
23 which 1st Rate could have reasonably relied. Def.’s Decl., 1:23-1:25. According to the  
24 record before the Court, 1st Rate concedes this point in its response to this Motion. Pls.’  
25 Am. Resp. Mot. Summ. J., 8:14-8:22. The Court notes, however, that this is inconsistent  
26 with 1st Rate’s complaint. Indeed, it states the opposite. Paragraphs 4.8 through 4.11 of  
27 the complaint clearly state that Ms. Gorkin failed to disclose material information about

1 her financial condition without stating what she did disclose that 1st Rate could have  
2 reasonably relied upon. Pls.' Compl., 4:23-5:13. Regardless, absent a writing, 1st Rate  
3 cannot succeed under § 523(a)(2)(B) as a matter of law, even if it reasonably relied on an  
4 oral or inferred material misrepresentation by Ms. Gorkin. The Court finds that to the  
5 extent that 1st Rate seeks a determination of nondischargeability under § 523(a)(2)(B),  
6 such claim necessarily fails, regardless of 1<sup>st</sup> Rate's reliance.

7 **3. A Genuine Dispute of Material Fact Exists Concerning a Claim Under**  
8 **§ 523(a)(2)(A).**

9 1st Rate's complaint does allege that Ms. Gorkin made other misrepresentations that  
10 do not require writing. Moreover, 1st Rate alleges that Ms. Gorkin did not intend to pay  
11 the full amount owed to 1st Rate despite having the ability to do so. Specifically,  
12 Paragraphs 4.3 and 4.6 of the complaint allege that Ms. Gorkin made representations  
13 regarding her intent to perform under the Contracts. Pls.' Compl., 4:5-4:22. Furthermore,  
14 1st Rate's response to the Motion appears to narrow the claim to a § 523(a)(2)(A) claim by  
15 stating its allegation is that Ms. Gorkin "had the ability to pay and intentionally did not  
16 pay." Pls.' Am. Resp. Mot. Summ. J., 7:21-8:22. Additionally, 1st Rate asserts that Ms.  
17 Gorkin hid latent defects from 1st Rate at the time of contracting, which she knew or  
18 should have known were not contemplated in the original Contracts, to induce 1st Rate to  
19 expand its work on the Residence, then created a dispute over additional work, and finally  
20 not pay for the work in excess of her initial down payment. Pls.' Am. Resp. Mot. Summ.  
21 J., 8:23-9:5.

22 The Court does not weigh credibility but plausibility and sufficiency at summary  
23 judgment. The Court must view the arguments in the light most favorable to the  
24 nonmoving party, drawing all inferences in 1st Rate's favor. *See Liberty Lobby, Inc.*, 477  
25 U.S. at 255. 1st Rate asserts that Ms. Gorkin induced it to contract with her knowing of  
26 latent defects and never intended to pay the full amount of the Contract, let alone the  
27 extra work that 1st Rate completed. The alleged facts raised by 1st Rate present such a

1 genuine issue in material fact, which renders summary judgment concerning any claim  
2 under § 523(a)(2)(a) improper. Accordingly, a genuine issue of material fact exists  
3 concerning a claim under § 523(a)(2)(A).

#### 4 **E. SUMMARY JUDGMENT CONCERNING THE § 523(A)(6) CLAIM**

##### 5 **1. 1st Rate's Claim, as Pleaded in Its Complaint, Fails as a Matter of Law.**

6 In its complaint, 1st Rate asserts substantially the same factual basis as its § 523(a)(2)  
7 claim. Specifically, Paragraphs 4.15 through 4.18 allege the same facts that give rise to  
8 its claims under § 523(a)(2). Pls.' Compl., 5-6:18. This, however, is insufficient to support  
9 a § 523(a)(6) claim as a matter of law if 1st Rate intends to seek judgment on this basis.  
10 Although not necessarily mutually exclusive, courts preserve the elements of  
11 nondischargeability in other, more specific subsections of section 523(a) to prevent section  
12 523(a)(6) from rendering superfluous those other subsections. For example, courts  
13 routinely hold that § 523(a)(6) cannot be used to circumvent § 523(a)(2)(B)'s writing  
14 requirement. *See Spencer v. Bogdanovich (In re Bogdanovich)*, 292 F.3d 104, 114–15 (2d  
15 Cir. 2002); *McCrary v. Barrack (In re Barrack)*, 217 B.R. 598, 606 (9th Cir. BAP 1998);  
16 *Jefferey M. Goldberg & Assoc. v. Holstein (In re Holstein)*, 272 B.R. 463, 482 (Bankr. N.D.  
17 Ill.2001); *Weiss v. Alicea (In re Alicea)*, 230 B.R. 492, 508 (Bankr. S.D.N.Y. 1999); *In re*  
18 *Gulevsky*, 362 F.3d 961, 964 (7th Cir. 2004). Therefore, if a claim fails under § 523(a)(2)(B),  
19 it necessarily fails under § 523(a)(6) as a matter of law if it is based on the same factual  
20 predicate.

21 The Court notes that 1st Rate did not plead tortious conduct in Superior Court. 1st  
22 Rate's Judgment results from a breach of contract, quantum meruit, and unjust  
23 enrichment. Nothing in the complaint alleges recovery under state tort law, let alone  
24 malicious and willful tortious conduct. 1st Rate certainly could have pleaded such conduct  
25 arising out of the breach of contract when it filed its counterclaims in Superior Court but  
26 did not. As such, with respect to the facts alleged in the complaint, Ms. Gorkin is entitled  
27 to summary judgment as a matter of law.

1           **2. 1st Rate’s New Facts Alleged in its Response to Summary Judgment**  
2           **Could Give Rise to a Viable § 523(a)(6) Claim.**

3           1st Rate’s response to the Motion does allege new facts that could lead to a  
4 nondischargeable claim under § 523(a)(6). See *In re Sangha*, 644 B.R. 843, 875 (Bankr.  
5 C.D. Cal. 2022); *In re Sicroff*, 401 F.3d 1101, 1107 (9th Cir. 2005). 1st Rate’s response  
6 asserts that Ms. Gorkin defamed 1st Rate in her letter to the Attorney General, “claiming  
7 that she would ruin the plaintiff’s life and bankrupt him” and making false statements to  
8 the Washington Department of Labor and Industries to harm 1st Rate. Pls.’ Am. Resp.  
9 Mot. Summ. J., 5:4-7:20. The Court concludes that 1st Rate’s response references the  
10 intentional tort of defamation under Washington state law to which § 523(a)(6)  
11 nondischargeability may attach. However, to succeed, 1st Rate would have to prove each  
12 element of such a claim, including any damages proximately caused by such tortious  
13 conduct. 1st Rate cannot import its Superior Court Judgment to a claim under § 523(a)(6)  
14 because it arises from separate and distinct facts and circumstances.

15           **3. 1st Rate Must Amend its Complaint to Proceed Under a New Theory for**  
16           **§ 523(a)(6) Nondischargeability.**

17           In its response to summary judgment, 1st Rate has made allegations that may support  
18 a cause of action under state tort law. This Court notes that it may construe new  
19 arguments at the summary judgment stage as a request by the party to amend its  
20 pleading. See Fed. R. Civ. P. 8(e) (“[p]leadings must be construed so as to do justice.”); Fed.  
21 Bankr. R. 7015(b). See also *Apache Survival Coalition v. United States*, 21 F.3d 895, 910  
22 (9th Cir. 1994) (when the parties raise issues at summary judgment that are outside the  
23 scope of the complaint, courts construe this as a request to amend the pleadings out of  
24 time pursuant to FRCP 15). See also Fed R. Civ. P. 15. (“a party may amend its pleading  
25 only with the opposing party's written consent or the court's leave. The court should freely  
26 give leave when justice so requires.”) However, the Court declines to do so for two reasons.

1 First, a procedural issue prevents the Court from recognizing 1st Rate's response as a  
2 formal request to amend its complaint. The complaint deadline, fixed by the Court in  
3 accordance with Rule 4007(c) in the underlying bankruptcy case, expired on January 29,  
4 2024, thirteen days after 1st Rate filed this adversary proceeding. Rule 4007(c) does not  
5 apply to bar amended complaints if the amendments relate back to the timely filed  
6 original complaint under Fed R. Civ. P. 15(c). *In re Gantes*, 2016 WL 1169124, at \*5 (9th  
7 Cir. BAP 2016). In the bankruptcy context, Rule 7015, incorporating Fed R. Civ. P. 15(c),  
8 provides that when the amended claim for relief or defense arises out of the "conduct,  
9 transaction, or occurrence set forth or attempted to be set forth in the original pleading[,]"  
10 it relates back to the date of the original pleading. *See In re Englander*, 92 B.R. 425, 427  
11 (9th Cir. BAP 1988). *See also In re Dean*, 11 B.R. 542, 545 (9th Cir. BAP 1981) (holding  
12 that an amended claim will relate back if "the specified conduct of the defendant, upon  
13 which the plaintiff is relying to enforce his amended claim, is identifiable with the original  
14 claim.").

15 Second, To provide adequate notice to Ms.Gorkin and her counsel for trial, 1st Rate  
16 must identify the specific state law tort or torts it alleges and all elements of such torts.  
17 Therefore, the Court concludes that 1st Rate must file a formal motion requesting  
18 permission from the Court to amend its complaint in accordance with Fed. R. Civ. P 15(a)  
19 and this order to proceed under its new theory under § 523(a)(6) and establish why its  
20 amendment relates back to its original complaint in accordance with Fed. R. Civ. P 15(c).

#### 21 IV. CONCLUSION

22 The Court finds that 1st Rate has demonstrated that material issues of genuine fact  
23 exist concerning any § 523(a)(2)(A) claim. Accordingly, the Court denies Ms. Gorkin's  
24 Motion concerning the § 523(a)(2)(A) claim.

25 The Court finds that Ms. Gorkin is entitled to summary judgment as a matter of law  
26 concerning any § 523(a)(2)(B) claim because 1st Rate has not established that it relied on  
27 any written statements pertaining to Ms. Gorkin's financial condition that were

1 materially false. Furthermore, the Court finds that Ms. Gorkin is entitled to summary  
2 judgment as a matter of law concerning the § 523(a)(6) claim, as currently alleged in 1st  
3 Rate's filed complaint. Accordingly, the Court grants Ms. Gorkin's Motion concerning the  
4 § 523(a)(2)(B) and (a)(6) claim.

5 The Court shall enter an order in accordance with and incorporating this  
6 memorandum decision.

7  
8 /// End of Memorandum Decision ///